IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE C.N.RAMACHANDRAN NAIR

TUESDAY, THE 4TH DECEMBER 2007 / 13TH AGRAHAYANA 1929

OP.No. 18411 of 1997(P)

PETITIONER:

DANESH KUMAR GUPTA,
PROPRIETOR,
JAYA MEDICALS, CALICUT.

BY ADV. SRI.S.A.NAGENDRAN
SRI.M.RAMESH CHANDER
SRI.B.REGHUNATH

RESPONDENTS:
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1. INSPG. ASST. COMMISSIONER (INV. BRANCH),
OFFICE OFTHE DEPUTY COMMISSIONER(INT),
BOARD OF REVENUE (TAXES), CALICUT.

2. SALES TAX OFFICER, III CIRCLE, CALICUT.

3. DEPUTY COMMISSIONER OF SALES TAX, CALICUT.

4. BOARD OF REVENUE (TAXES), TRIVANDRUM.

BY SPL. G.P. SRI.K.VINOD CHANDRAN

THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD ON 04/12/2007, ALONG WITH OP NOS.18391 & 18423 OF 1997 & OP NO. 29631 OF 2002, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON CMP NO.39758/1997 IN O.P. NO.18411/2007

DISMISSED:

4.12.2007 SD/-(C.N.RAMACHANDRAN NAIR, JUDGE.)

APPENDIX

PETITIONER'S EXHIBITS:

P1: PHOTOCOPY OF WEALTH TAX STATEMENT AS ON 31.3.90 FILED BY B.B.AGGARWAL.

P1a: .DO. BY S.M.GUPTA.

P2: PHOTOCOPY OF INCOME TAX ASST. ORDER FOR 1990-91 OF B.B.AGARWAL.

P2a: .DO. FOR 1991-92 FILED BY S.M.GUPTA.

P3: PHOTOCOPY OF WEALTH TAX STATEMENT AS ON 31.3.91 FILED BY B.B.AGARWAL.

P3a: .DO. BY S.M.GUPTA.

P4: PHOTOCOPY OF IT ASSMT. ORDER FOR 1991-92 RELATING TO B.B.AGARWAL.

P4a: PHOTOCOPY OF INCOME TAX RETURN FOR 1992-93 OF S.M.GUPTA.

P5: COPY OF NOTICE ISSUED BY R1 DT.1.3.1995.

P6: PHOTOCOPY OF NOTICE DT.16.3.95 ISSUED BY R1.

P7: COPY OF COMPOUNDING APPLICATION SUBMITTED TO R1.

P8: COPY OF CHALAN EVIDENCING PAYMENT OF COMPOUNDING FEE.

P9: COPY OF NOTICE ISSUED BY R1 DT.11.12.1995.

P10: COPY OF INV. NO.16 DT.20.5.93.

P11: COPY OF REPLY TO EXT.P9 DT.4.1.96.

P12: COPY OF LETTER RECEIVED FROM S.S.PERFUMERS.

P13: COPY OF ORDER ISSUED BY R1 DT.2.5.96.

P14: COPY OF ORDER PASSED BY R3 DT.30.10.96.

P15: COPY OF NOTICE OF ARGUMENTS FILED BEFORE R4.

P16: COPY OF ORDER PASSED BY R4 IN STRP NO.157/97.

P17: TRUE COPY OF ORDER NO.IB.937-93-D, DT.21.10.1997 ISSUED BY R1.

TRUE COPY

PA TO JUDGE

C.R.

C.N.RAMACHANDRAN NAIR, J.

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O.P. Nos.18411, 18423 & 18391 of 1997 &
29631 of 2002

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Dated this the 4th day of December, 2007.

JUDGMENT

The petitioners were partners of a firm by name Jaya Medicals which was a registered dealer under the KGST Act. However, according to the petitioners, common petitioner in O.P. Nos.18423/1997 and 29631/2002 retired in 1990 and the petitioner in O.P. 18391/1997 retired in March 1991. Consequent upon the retirement of the other two partners, petitioner in O.P. 18411/1997 continued as proprietor of the business is the case of petitioners. According to the petitioners, the transaction which led to penalty levied under Section 45A of the KGST Act which is impugned in all the O.Ps. happened during 1993-94 when the business was run as proprietorship by Mr.Danesh Kumar Gupta. The Assessing Officer levied penalty for alleged evasion of tax on the Firm consisting of all the partners. Though the penalty levied was contested in two levels of revision, it was confirmed though in a modified form by the Commissioner of Commercial Taxes by order dated 11.9.1997, produced as Ext.P16 in O.P. Nos.18411, 18423 and 18391 of 1997.

2. I heard counsel for the petitioners and the Special Government Pleader appearing for the respondents. Common counsel appearing for petitioners in all the O.Ps. contended that on account of retirement of the other two partners, liability if at all is only on Mr.Danesh Kumar Gupta who carried on business as proprietorship concern during 1993-94. So far as O.P. 18411/1997 filed by the said Gupta is concerned, challenge is against levy of penalty on merits. The Special Government Pleader opposed the first contention by referring to the statutory provision particularly, Section 21 of the KGST Act and Rule 5(8)(b) and (d) of the KGST Rules and he contended that since the retired partners did not give notice to the department, department was entitled to assume continuation of the firm making all the partners liable for the penalty levied. Rule 5(8) with sub-clauses are extracted hereunder for easy reference.

> "5(8)(a) Every Partnership Firm shall, at the time of submitting the application for registration under Section 14, file a copy of the partnership deed and a declaration in Form 2 signed by all the partners stating the names and addresses of all the partners and their respective shares in the business along with the application for registration. Every company or association of persons or body of individuals shall, at the time of submitting the application for registration under Section 14, file a copy of the Memorandum of Association and Articles of Association along with the application for registration.
>
> (b) If a partner retires without the partnership being

> dissolved thereby, he shall send to the registering authority a declaration in Form 3 within thirty days of his retirement, along with a copy of the deed of retirement.
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> (c) Every dealer, including a joint family entering into or forming a partnership in regard to his business shall, within thirty days of such event happening, send to the registering authority of the area in which his principal place of business is situated, fresh application for registration in Form 1 as provided in Sub-rule(7) along with copies of the partnership deed and declaration in Form 2 as provided in clause (a).
>
> (d) If any Partnership Firm is dissolved and the business is taken over by an individual, he shall apply for fresh registration as provided for in Sub-rule (7)."

It is clear from sub-clause (a) that at the time of granting registration, the Firm is bound to furnish copy of partnership deed to bring on record names and addresses of partners. As and when a partner retires without involving dissolution of the firm, the firm or the partner is bound under clause (b) to give notice in Form No.3 within thirty days from date of his retirement. In this case it is conceded that none of the two partners who are said to have retired in 1990 and 1991 respectively gave notice in Form No.3 to the Assessing Officer. Consequently retirement of the partners and automatic dissolution of the firm after retirement of two partners out of three was not within the knowledge of the department. It is made mandatory in clause (d) above that after a partnership is dissolved and business is taken out by an individual, such individual has to take separate registration to continue

business as registered dealer. The petitioners in all the O.Ps. admittedly did not comply with the procedural requirement under the Rules in as much as neither the firm nor the partners gave notice of retirement of the partners. Besides this, the continuing partner who is the petitioner in O.P. 18411/1997 did not take a fresh registration under the KGST Act in April 1991 after dissolution of the firm consequent upon the alleged retirement of the other two partners. Even though counsel for the petitioner contended that retirement of partners and dissolution of the firm was known to the Assessing Officer and the continuing partner filed returns declaring the business as his proprietorship concern, the Special Government Pleader referred to Ext.P13 wherein it is stated that the continuing partner Mr.D.K.Gupta appeared before the Assessing Officer on 13.6.1995 and deposed that the business was continuously carried out as a partnership concern consisting of himself and his wife with effect from 1991. However, it is stated in the said order that the continuing partner did not produce any such partnership deed with his wife as claimed by him. In these circumstances the question to be considered is whether the department is entitled to proceed against the partners for recovery of arrears of penalty even after retirement. In this regard Section 45 of the Indian Partnership Act, 1932 has to be referred and therefore, the said Section is extracted

hereunder:

> "45. Liability for acts of partners done after dissolution:- (1) Notwithstanding the dissolution of a firm, the partners continue to be liable as such to third parties for any act done by any of them which would have been an act of the firm if done before the dissolution, until public notice is given of the dissolution:
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> .....
>
> (2) Notices under sub-section (1) may be given by any partner."

The principle laid down in Section 45 of the Partnership Act is that partners who hold out to be members of the firm to third parties will continue to be liable as such, if retirement or dissolution is not informed to third parties through public notice. It is this principle that is incorporated in Rule 5(8) (b) of the KGST Rules which requires statutory notice to the Assessing Officer about dissolution of the Firm. Therefore, if retiring partner does not give notice in Form No.3, he will continue to be liable for payment of tax, penalty etc. payable by the Firm or the continuing partners or partner to the department even after his retirement as if he has not retired. In the circumstances, the contention of the petitioners that retired partners are not liable for payment of penalty is rightly rejected by the lower authorities. The O.P. Nos.18423 and 18391 of 1997and 29631 of 2002 are therefore

dismissed. However, on equitable grounds I hold that recovery against continuing partners need to be made only if amount is not recovered from petitioner in O.P. 18411/1997. The attachments made however will stand unless recovery is effected. However, if recovery is not effected from the continuing partner who is the petitioner in O.P. 18411/1997, penalty and other amounts due can be recovered from the petitioners in the other O.Ps. as provided under Section 21 of the KGST Act.

3. The next question to be considered is challenge against Ext.P16 order in O.P. No.18411/1997. Counsel for the petitioner contended that transactions with reference to which penalty is levied are consignment sales effected by the petitioner through agents at Kanpur and U.P. However, Special Government Pleader contended that various consignments of Sandalwood oil transported were without documents with bogus registration numbers which itself prove that the assessee never intended to account the transactions. Since the goods were transported under cover of bogus registration numbers, the inference of evasion of tax drawn by the department cannot be said to be arbitrary or incorrect. Moreover, it is pertinent to note that Section 6A of the CST Act casts burden on the dealer who transfers the goods outside the State other than under contract of sale to prove the same. Rule 5A of the CST (Kerala) Rules prescribes

conditions and documents for proving consignment sales. It is seen from Ext.P16 order that petitioners have not ventured to prove that sales were effected in U.P. after transfer of goods from Kerala to Kanpur on consignment basis. The petitioners could have produced consignment agency agreements, sale particulars, details of commission paid and even details of tax paid in U.P. for establishing their case. However, it is seen that not even an attempt is made to prove the transaction as consignment transfers as claimed by them before the lower authorities. In the circumstances, levy of penalty under Section 45A of the KGST Act for evasion of tax is perfectly justified. So far as quantum of penalty is concerned, penalty originally levied was Rs.59, 68,240/- which was reduced by the Commissioner to around Rs.18 lakhs after partially accepting petitioner's claim. Therefore, petitioner is not entitled to any quantum relief also. Thus O.P. 18411/1997 also fails and is dismissed. It is stated that one item of property is sold by the Government to itself for want of purchasers. Since the property purchased in Revenue sale is not utilised by the Government for any other purpose, the property can be restored to the owner if entire penalty is paid with interest within a reasonable time. Having regard to the amount involved and since business is closed, I grant time till 28.2.2008 to the owner of the property to retrieve the same by

clearing the arrears. If payment is made on or before 28.2.2008, sale will stand set aside.

C.N.RAMACHANDRAN NAIR
Judge

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